

EDITOR'S NOTE: 89 I.D. 632; Overruled to the extent inconsistent with Alpine Construction Co. v. OSM, 101 IBLA 128 (1988); Alpine modified -- Turner Brothers, Inc. v. OSM, 102 IBLA 299, 95 I.D. 75, (May 31, 1988); appeal filed, Alpine Construction Co. v. Lujan, Civ.No. 88-116-C (E.D. Ok. Mar. 9, 1988), dismissed upon application by Alpine, June 8, 1988.

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-244

August 6, 1987

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming issuance of notice of violation. TU 5-42-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: Generally

OSMRE has jurisdiction to issue a notice of violation of a State permanent regulatory program where OSMRE has assumed direct Federal enforcement of the State program pursuant to public notice duly published in the Federal Register.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally -- Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions.

3. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally -- Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for

failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, and Stuart A. Sanderson, Esq., Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Turner Brothers, Inc. (TBI), has appealed from a December 31, 1985, decision of Administrative Law Judge Frederick A. Miller, affirming issuance of notice of violation (NOV) No. 84-3-6-26 by the Office of Surface Mining Reclamation and Enforcement (OSMRE), with respect to appellant's Muskogee No. 2 mine, which was in the reclamation phase of its operation.

This case was initiated when OSMRE served NOV No. 84-3-6-26 on appellant on December 10, 1984, following a December 8, 1984, inspection of appellant's mine. The NOV charged appellant with three violations: 1) failure to obtain approval from the Oklahoma Department of Mines (ODM) prior to construction of "small depressions" on the disturbed area, in violation of section 816.102(c) of the Oklahoma Permanent Regulatory Program Regulations (OPRPR) (violation 1); 2) failure to comply with the terms and conditions of the approved permit (No. 82/83-4004), in violation of section 771.19 of the OPRPR (violation 2); and 3) failure to pass all water from the disturbed area through a sedimentation pond, in violation of section 816.42(a)(1) of the OPRPR (violation 3). In the case of each violation, OSMRE required appropriate corrective action before a specified date. On January 9, 1985, appellant filed pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275 (1982), with the Hearings Division, Office of Hearings and Appeals, an application for review of NOV No. 84-3-6-26, challenging the fact of each violation. OSMRE filed an answer to appellant's application for review on January 31, 1985.

The case was subsequently assigned to Judge Miller, who conducted a hearing on September 19, 1985, in Tulsa, Oklahoma, at which both parties were represented. Subsequently, on December 31, 1985, Judge Miller issued his decision affirming issuance of NOV No. 84-3-6-26. Appellant has appealed from that decision.

[1] In its statement of reasons for appeal (SOR), appellant initially challenges OSMRE's jurisdiction to issue the NOV involved herein. Appellant contends that at the time the NOV was issued Oklahoma had primacy to issue NOV's because the purported Federal takeover of the Oklahoma surface mining regulatory program was void. Appellant bases its conclusion that the takeover was void on the fact that the applicable final rule providing for OSMRE's assumption of jurisdiction (49 FR 14674 (Apr. 12, 1984)) was published less than 30 days prior to its effective date, in violation of 5 U.S.C. § 553(d) (1982).

In his December 1985 decision, Judge Miller correctly concluded that OSMRE had jurisdiction to issue the NOV involved herein. On April 12, 1984, OSMRE published a final rule (30 CFR 936.17) in the Federal Register providing, effective April 30, 1984, for direct Federal enforcement of the Oklahoma surface mining regulatory program which the Director, OSMRE, had concluded was not being adequately enforced by the State. That action was taken pursuant to section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), and 30 CFR Part 733. There is no question that the final rule was published less than 30 days prior to its effective date, in violation of 5 U.S.C. § 553(d) (1982). Nevertheless, we adhere to the order of the district court in Oklahoma v. Hodel, Civ. No. CIV-84-1202-A (W.D. Okla. Dec. 3, 1985), which, in considering an identical challenge to OSMRE's assumption of jurisdiction based on 5 U.S.C. § 553(d) (1982), held that the "self-contained administrative procedures in SMCRA govern this case, overriding APA." Indeed, section 521(b) of SMCRA provides that the Secretary shall give public notice of a finding of inadequate enforcement by a state and that the Secretary shall institute Federal enforcement "beginning with such public notice." 30 U.S.C. § 1271(b) (1982). It was the holding of the district court that this SMCRA provision effectively supplanted 5 U.S.C. § 553(d) (1982). Accordingly, we conclude that OSMRE had jurisdiction to issue the NOV involved herein. Turner Brothers, Inc. v. OSM, 93 IBLA 194 (1986), appeal filed, Turner Brothers, Inc. v. OSM, CIV. No. 86-C-852 C (N.D. Okla. Sept. 15, 1986); B & J Excavating Co. v. OSM, 89 IBLA 129 (1985).

Appellant next contends that OSMRE failed to establish at the September 1985 hearing a prima facie case as to either violation 1 (failure to obtain prior approval for construction of small depressions) or violation 3 (failure to pass all water from the disturbed area through a sedimentation pond), which violations were sustained by Judge Miller. Appellant does not challenge Judge Miller's December 1985 decision to the extent it sustained violation 2 (failure to comply with terms and conditions of an approved permit).

[2] Violation 1 was specifically cited for failure to obtain ODM approval prior to constructing small depressions in the southwest portion of the disturbed area. Exh. R-1 at 2. In order to abate the violation, OSMRE required appellant to "[r]egrade the depression areas adequately for eliminating the water holding problem" before February 10, 1985. Id. The regulation cited by OSMRE as having been violated was section 816.102(c) of the OPRPR, which provided: "Small depressions may be constructed, if they -- (1) Are approved by the Department to minimize erosion, conserve soil moisture, or promote vegetation; (2) Do not restrict normal access; and (3) Are not inappropriate substitutes for lower grades on the reclaimed land."

In his December 1985 decision, Judge Miller concluded that the testimony of OSMRE inspector Joseph Funk, who had inspected appellant's mining operations and issued the NOV involved herein, was sufficient to establish a prima facie case of a violation of section 816.102(c) of the OPRPR. Judge Miller specifically referred to testimony that the inspector had found several depressions in the south central portion of the permit area which were not provided for in appellant's approved permit (Decision at 3). Inspector Funk testified that the depressions were "shallow * * * [p]robably six inches of water or less and varying in size from 30, 40, 50 feet more or less" (Tr. 10).

Judge Miller also addressed appellant's contention that the depressions had not been constructed by appellant within the meaning of section 816.102(c) of the OPRPR: "Since these depressions came about as a direct result of TBI's mining operations they certainly are not the result of natural geologic processes. Therefore, it is the opinion of the undersigned that these depressions may be considered to have been constructed" (Decision at 3).

On appeal, appellant contends that the depressions found by the OSMRE inspector occurred as a result of the settling of the land after it had been mined, backfilled, graded, resoiled and revegetated, and thus could not be said to have been constructed within the meaning of section 816.102(c) of the OPRPR (SOR at 8). Appellant also contends that the land had been revegetated with a temporary cover of winter wheat in the summer of 1984 and that excessive rainfall and the lateness of the year made regrading and revegetation of the land with a permanent cover of bermuda grass during the fall and winter of 1984 inappropriate (SOR at 6). Thus, appellant argues that, even if appellant was guilty of having depressions located on its disturbed area, it should not have been cited where the actions appellant took were reasonable and there was no evidence that the shallow depressions were adversely affecting vegetation. *Id.* at 8.

In response to appellant's arguments, OSMRE contends that appellant constructed the depressions within the meaning of section 816.102(c) of the OPRPR by virtue of appellant's "poor or inadequate regrading and retopsoiling efforts" (OSMRE Brief at 7). OSMRE also argues that the OSMRE inspector had no discretion whether to cite appellant for violating section 816.102(c) of the OPRPR based on mitigating or extenuating circumstances.

The evidence clearly establishes that small depressions were present on the area disturbed by appellant's mining operations at the time of the December 1984 OSMRE inspection and that these depressions had not been approved by ODM. The only question is whether the depressions were constructed within the meaning of section 816.102(c) of the OPRPR. We conclude that OSMRE did not establish a prima facie case that the depressions were constructed by appellant. Where there is no suggestion that appellant deliberately created the depressions there are two possible explanations for their existence, both of which are equally plausible. OSMRE argues that the depressions were negligently created by appellant during the process of regrading and retopsoiling. Assuming this were the case, we would conclude that appellant had constructed the depressions, albeit inadvertently. However, there is simply no proof that this is what happened. The other explanation is that the land naturally settled following appellant's regrading and retopsoiling. This was the opinion of Gregory Govier, appellant's chief mining engineer. *See* Tr. 47. In addition, inspector Funk admitted that the land was subject to settling, especially as a result of water accumulation, and that the area had experienced a very wet fall in 1984 (Tr. 18-19). Assuming that settling had caused the depressions, we would conclude that appellant had not constructed them. However, there is also no proof that this is what happened. Nevertheless, we conclude that, in establishing a violation of section 816.102(c) of the OPRPR, OSMRE had the initial burden, under 43 CFR 4.1171, to establish a prima facie case which included proof that appellant had, whether by design or not, constructed small depressions without prior approval.

In the absence of such proof, we hold that OSMRE failed to establish a prima facie case. Accordingly, we reverse Judge Miller's December 1985 decision to the extent it affirmed issuance of NOV No. 84-3-6-26 as to violation 1.

[3] Violation 3 was cited for failure to pass water from the northeast portion of the disturbed area through a sedimentation pond (Exh. R-1 at 4). In order to abate the violation, OSMRE required appellant to construct an "appropriate sedimentation control structure for minimizing additional contributions of sediment off of the permit area" before January 10, 1985. *Id.* The regulation cited by OSMRE as having been violated was section 816.42(a)(1) of the OPRPR, which provided: "All surface drainage from the disturbed area with the exception of reclaimed areas, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

In his December 1985 decision, Judge Miller concluded that the testimony of inspector Funk was sufficient to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR. Judge Miller referred to testimony that the inspector had found drainage had flowed from the northeastern portion of the disturbed area north into a farm pond and then into a stream which continued off the permit area and that the drainage did not pass through a sedimentation pond before leaving the permit area (Decision at 4). Inspector Funk diagrammed the drainage flow on a map of the permit area. *See* Exh. J-1; Tr. 30-33.

On appeal, appellant contends that in order to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR, OSMRE was required to establish a prima facie case as to each of the elements of the violation, which, as enunciated in Avanti Mining Co., 4 IBSMA 101, 107, 89 I.D. 378, 381 (1982), are: "(1) The existence of surface drainage which flowed from an area disturbed by [the permittee's] mining activity; (2) that this surface drainage did not pass through a sedimentation pond; and (3) that this drainage flowed off the permit area." Appellant argues that OSMRE failed to establish a prima facie case as to the third element set forth in Avanti, where the OSMRE inspector admitted that he did not see any drainage leaving the permit area or even follow the water from the pond and there was no evidence of past drainage flowing off the permit area (SOR at 11).

In response to appellant's arguments, OSMRE contends that it had established a prima facie case of a violation of section 816.42(a)(1) of the OPRPR where the testimony of inspector Funk established that drainage from the disturbed area "had left the permit area and would continue to leave the permit area" (OSMRE Brief at 11).

Before addressing the evidence presented at the September 1985 hearing, it is important to clarify the specific standard applicable to the third element necessary to establish a violation based on a failure to pass drainage from a disturbed area through a sedimentation pond. As enunciated in Avanti Mining Co., *supra* at 107, 89 I.D. at 381, the third element concerns simply whether drainage flowed off the permit area. A later case, Consolidation Coal Co., 4 IBSMA 227, 242, 89 I.D. 632, 640 (1982), elaborated on this standard, concluding that there must be "some credible evidence of present or

past drainage from the disturbed area flowing off the permit area." Applying this standard, the Board in Consolidation Coal held that there was sufficient evidence to establish a prima facie case that drainage "had flowed * * * off the permit area" based on the fact that the OSMRE inspector testified that the berm at the edge of the permit area had been breached and a photograph of the "area of the breach clearly shows an erosion channel containing standing water," in conjunction with the topographic features depicted on a map of the area. Id. at 238, 89 I.D. at 638. The Board concluded that there was credible evidence of past drainage leaving the permit area. See also Black Fox Mining & Development Corp., 2 IBSMA 277, 87 I.D. 437 (1980).

Judge Miller, however, took the applicable standard one step further, concluding that the third element included situations where there was proof that drainage would leave the permit area (Decision at 4). Judge Miller purported to base this conclusion on the "necessary elements" as set forth in Consolidation Coal. Id. However, there is no such holding in that case. We presume that Judge Miller derived this interpretation of the third element from the statement in Avanti Mining, as paraphrased in Consolidation Coal, to the effect that the sedimentation pond requirement is a "preventive measure [such that] * * * a showing of the harm it is intended to prevent is not necessary to establish a violation of the requirement." Consolidation Coal Co., supra at 237, 89 I.D. at 637. See Decision at 5. However, the harm to which the statement refers is not drainage flowing off the permit area, but, rather, sediment leaving the permit area. In other words, in order to establish a violation of the sedimentation pond requirement it is not necessary to establish that sediment is leaving the permit area, or even that the sediment is then causing harm to any water outside the permit area. The regulatory requirement is simply not expressly directed to sediment, or the harm it may cause once it leaves the permit area. Rather, it is expressly directed to drainage which must be passed through a sedimentation pond before leaving the permit area. Thus, a violation will not be deemed to have been established unless there is proof that drainage has in fact not been passed or is not passing through a sedimentation pond before leaving the permit area. This is why Consolidation Coal Co., supra at 242, 89 I.D. at 640, requires proof of "present or past drainage * * * flowing off the permit area." Proof that drainage might at some future time flow off the permit area would not suffice.

Turning to the evidence adduced at the hearing, we conclude that there was not sufficient evidence to establish a prima facie case of a violation of section 816.42(a)(1) of the OPRPR. Appellant does not dispute on appeal inspector Funk's testimony that drainage from the area disturbed by appellant's reclamation operations had flowed north past a gully and into a farm pond, which is situated just north of the disturbed area in an undisturbed portion of the permit area. 1/ See Tr. 30-32; Exh. J-1. At this point, Inspector Funk admitted that he "did not follow [the drainage] until it left the permit

1/ Appellant has not questioned that the farm pond did not satisfy the regulatory requirement to pass all drainage through a sedimentation pond. There is simply no evidence that the pond meets minimum requirements for a sedimentation pond. See Tr. 32; Consolidation Coal Co., supra at 239, 89 I.D. at 638.

[area]" (Tr. 32). Rather, he relied on appellant's aerial photograph of the area (Exh. J-1), which depicts contour lines and a stream which flows north and then northeast, eventually leaving the permit area (Tr. 32). Inspector Funk surmised that the drainage from the disturbed area which entered the farm pond subsequently entered the stream and flowed off the permit area. However, looking at Exh. J-1, there is a gap of perhaps 400 feet between the farm pond and the stream which, as inspector Funk testified, is located at the outlet of Sediment Pond #2 and then flows northeast along the route of a tree line (Tr. 32). This gap, which encompasses the purported route of the drainage after it leaves the farm pond, is through an undisturbed area. The only evidence that the drainage from the area disturbed by appellant's reclamation operations leaves the farm pond, crosses the undisturbed area and enters the stream is the contour lines on Exh. J-1. However, it is quite possible that the farm pond retains any drainage from the disturbed area or that, even if drainage leaves the pond, it does not reach the stream. ^{2/} In any case, we are not prepared to conclude that contour lines alone are sufficient evidence of past drainage to establish a prima facie case that drainage from the disturbed area had flowed off the permit area. As the court observed in Black Fox Mining & Development Corp. v. Andrus, Civ. No. 80-913 (W.D. Pa. Jan. 21, 1981), a similar case which hinged on the third element set forth in Avanti Mining:

"[O]n close examination of the evidence presented by the Office of Surface Mining at the hearing it is evident that the record is devoid of substantial evidence to support the finding that drainage had left the permit area. * * * The only piece of evidence from which this element of the violation could be gleaned is from government's Exhibit 8, a mining drainage and mining map of the area surrounding the permit area. * * * Other than the contours contained in the map, there was no evidence of the type of terrain involved or whether drainage or the ground water would travel unimpeded from the disturbed area and leave the permit area.

Memorandum Opinion at 5. Rather, an OSMRE inspector must make some minimal effort to trace the purported route of the drainage on the ground. Simply said, this case is a far cry from the "standing water," which together with topographic features, was sufficient to raise a prima facie case in Consolidation Coal. Accordingly, we reverse Judge Miller's December 1985 decision to the extent it affirmed issuance of NOV No. 84-3-6-26 as to violation 3.

^{2/} The relatively minor nature of the drainage problem is best illustrated by the measures designed to correct the problem. Govier testified that, as a result of an April 1984 OSMRE inspection and with OSMRE's concurrence, hay check dams were placed along the drainage route from the disturbed area to the farm pond, rather than constructing a sedimentation pond (Tr. 48-50). Inspector Funk testified that he observed hay bales, but felt that these were inadequate "to stop the sediment from leaving this disturbed area before flowing north" (Tr. 36). However, he too required only some form of sediment control rather than a sedimentation pond. See Tr. 38-41.

Pursuant to the authority delegated to the Board of the Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed with respect to violations 1 and 3 of NOV No. 84-3-6-26.

Franklin D. Arness
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternate Member

Gail M. Frazier
Administrative Judge

